American Steel Erectors, Inc. *and* David Paquette.
Case 1–CA–37051

August 26, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA, AND MEMBERS LIEBMAN AND SCHAUMBER

On March 2, 2000, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

At issue before us is whether David Paquette, an apprentice coordinator and instructor for the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 474, lost the protection afforded to Section 7 concerted activity when he voiced his objections to the Respondent's application for certification of its apprenticeship program.

Facts

The Respondent presented its apprenticeship program for certification at a February 20, 1997 meeting of the New Hampshire Apprenticeship Council. Paquette was present at the meeting but did not speak. Paquette thereafter attended council meetings on May 1, June 12, and August 25. Representatives of the Respondent, including its president, Raymond Cilley, were present at these meetings. At each meeting, Paquette voiced his opposition to the Respondent's apprenticeship program, challenging the Respondent's safety record, workers' compensation coverage, and ability to offer comprehensive training.

At the May meeting, Paquette brought the results of a safety record search of the Respondent's business that he received in response to a request he submitted to the Occupational Safety and Health Administration. After the Respondent stated that it had an excellent safety program, Paquette stood up and let the OSHA document unfold to the floor. At trial, Paquette acknowledged that he later learned that the Respondent was not responsible for all of the violations listed on that document.

At the same meeting, Paquette alleged that from November 1, 1996, through November 30, 1996, the Respondent, who was working on a project in Massachusetts, did not have workers compensation insurance in that State. The apparent basis for Paquette's assertion was that the Massachusetts Industrial Accidents Board, in response to an inquiry by Paquette, had sent Paquette a letter stating that they had no record concerning the Respondent. A representative of the Respondent's insurance company was present at the meeting when Paquette made his allegation. He disputed Paquette's statement, and he presented documents to support his assertion. At that point, Paquette stood up and, using his cellular telephone, called the Massachusetts Industrial Accidents Board. He asked one of the council members to "please talk to somebody that there was a lapse according to the information that I have." No council member accepted his offer.

At the next meeting, in June, Cilley presented a memo on which he had crossed out a majority of the alleged OSHA violations that Paquette had shown to the council at the previous meeting. Cilley testified that while OSHA had cited Respondent for violations, the Respondent was not responsible for a number of the violations listed on Paquette's document. He specifically disputed Paquette's claim that the Respondent was liable for 22 out of the 30 violations.[1] Paquette insisted to the council that the "cross outs" were inaccurate. However, Paquette never contacted OSHA for an updated or corrected list.

At one meeting, Paquette told the Council that "putting ironworkers up on the steel is like throwing babies into the Merrimack River if they worked for [the Respondent]." At the August 1997 meeting, the Council voted to approve the Respondent's request for certification of its apprenticeship program.

In September 1998, the Respondent sought iron workers through the New Hampshire Department of Unemployment and Training. Paquette, who had 20 years' ironwork experience and was about to lose his job with the Union, contacted Catherine Sanderson, the Respondent's human resource and payroll administrator, and inquired about the position. Paquette asked Sanderson whether the Respondent would hire a union ironworker. Sanderson replied that the Respondent considered only an applicant's experience, not his or her union affiliation. Sanderson told Paquette that she would get back to him regarding when he could come in for an interview. Paquette then told Sanderson that working for the Respondent would be an opportunity to organize its employees, and Sanderson replied "really."

Approximately 2 weeks later, Sanderson telephoned Paquette. She asked him if he was the same David Paquette who had attended the Apprenticeship Council meetings in 1997. Paquette informed her that he was indeed the same person. Sanderson then informed Paquette that the Respondent was denying his application based on his actions at the council meetings.

[1] The record reveals that the Respondent was responsible for, at most, 11 of the alleged 30 violations listed in the OSHA report, including one fatality about 8 years earlier.

The Respondent's president, Cilley, testified that he decided not to consider Paquette for a position because he "didn't personally like [Paquette] based on conduct at a meeting . . . ." Ultimately, the Respondent hired three employees between September 1998 and March 1999, including a class II Ironworker and two apprentices. On July 28, 1999, the Regional Director issued a complaint alleging that the Respondent violated the Act by refusing to consider Paquette for hire because of his affiliation with and his concerted activities on behalf of the Union.

Judge's Decision

The judge recommended dismissal of the complaint. The judge found that the General Counsel failed to provide evidence sufficient to support an inference of antiunion animus on behalf of the Respondent. Specifically, the judge noted that the Respondent never displayed hostility toward the Union, did not have a history of rejecting applications from union members, and had no record of unfair labor practices. The judge determined that the Respondent reasonably believed that Paquette's statement to the Council equating working for the Respondent with throwing babies into the river was an "outrageous and defamatory exaggeration[ ]." The judge characterized Paquette's assertions regarding the Respondent's safety record and insurance compliance as "flamboyant misrepresentations." The judge further stated that it would not be unreasonable to conclude that Paquette's conduct was reckless enough to separate his personal behavior from the res gestae of his alleged protected activity. In sum, the judge concluded that "at best, the General Counsel ha[d] made a weak case" of showing that the basis for Respondent's refusal to consider Paquette for hire was his protected activity.

In considering the Respondent's affirmative defenses, however, the judge determined that the Respondent produced sufficient evidence to rebut the General Counsel's case. The judge found that the Respondent had legitimate nondiscriminatory business reasons for refusing to consider Paquette for employment, i.e., that someone with Paquette's demeanor would not fit very well with the other workers and that Paquette's interest in the position was not sincere. The judge specifically noted that the record "fail[ed] to show that Paquette was not considered for hire for any other reason than his offensive, intemperate language and provocative conduct in front of the person in Respondent's company who had the primary hiring authority." Accordingly, the judge recommended dismissal of the complaint.

Discussion

It is undisputed that the Respondent refused to consider Paquette for employment because of his conduct before the Council. Thus, the only issue before us is whether this conduct was or was not protected under the Act. Once that is decided, our inquiry ends. See *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994) (*Wright Line* analysis unnecessary in single-motive case).

Since this case can be resolved based on the content and manner of the statements made by Paquette before the Council, we need not address whether there is record evidence sufficient to support a conclusion that Paquette was engaged in protected concerted activity at the time. For purposes of this decision we will assume arguendo that Paquette's appearances before the Council constituted protected concerted activity. However, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984). Thus, although the Board has recognized that not every impropriety committed during concerted activity places the employee outside the protection of Section 7 (*CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578 (2000)), and the employee's right to engage in concerted activity must permit some leeway for impulsive behavior (*Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965)), nevertheless, under certain circumstances, concerted activity may lose the Act's protection. When an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is so egregious as to take it outside the protection of the Act. *Consumers Power Co.*, 282 NLRB 130, 132 (1986). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The same factors are relevant here, in the context of a refusal-to-hire allegation.

Addressing the first two factors, we note that Paquette's conduct occurred during a public meeting of the Apprenticeship Council, the purpose of which was to evaluate and determine whether to certify the Respondent's apprenticeship program. The forum was, therefore, an appropriate place for Paquette to voice his concerns regarding the Respondent's program. The subject matter that Paquette addressed before the Council, safety records and insurance compliance, was also appropriate to the occasion and would ordinarily fall within the realm of protected concerted activity. Nonetheless, while the place and subject matter may have been appropriate, the manner in which Paquette conducted himself fell outside the boundaries of protected activity.

During one meeting, Paquette told the Council that "putting ironworkers up on steel is like throwing babies into the Merrimack River if they worked for [the Respondent]." Although Paquette did not use obscenities and was not loud or threatening, this statement warrants loss of the protection of the Act. Using vivid imagery, Paquette's comments portrayed the Respondent as a concern with a callous indifference to the safety of its employees. Simply put, Paquette's public statement was sufficiently extreme to warrant forfeiture of his Section 7 protection. See *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968).

The record does not indicate that Paquette's comments were made in the heat of the moment, nor that he was responding to unlawful or provocative behavior by the Respondent. Cf. *NLRB v. Vought Corp.*, 788 F.2d 1378, 1384 (8th Cir. 1986) ("[E]mployer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee.") (quoting *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 978 (5th Cir. 1982)). Paquette's disparaging remarks occurred in the absence of any labor management dispute. Rather, the only provocation for Paquette's conduct was the Respondent's submission, over a several month period, of an application for certification of its apprenticeship program.

Our dissenting colleague points out that Paquette owed the Respondent no duty of loyalty at the time he made his offensive statements. That is correct, but, as the dissent acknowledges, the issue is whether Paquette's statements rendered him unfit for future employment with the Respondent. See *Dreis & Krump*, 221 NLRB 309, 315 (1975) (standard is whether remarks were "so flagrant, violent, or extreme as to render the individual unfit for further service"). We are satisfied that Paquette's remarks satisfied that standard.

In sum, we find that, even assuming that Paquette was initially engaged in protected activity when he opposed the Respondent's application for certification of its apprenticeship program, Paquette lost any protection afforded by Section 7 when, through use of deliberate and outrageous exaggerations, he accused the Respondent of unsafe practices. Therefore, the Respondent's decision not to consider Paquette for hire was privileged, and dismissal of the complaint is proper.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

The Supreme Court has made clear, and the Board has repeatedly found, that the National Labor Relations Act protects extreme language.[1] In a presentation to a state agency that oversees employers' apprenticeship programs, union employee David Paquette criticized the Respondent's job-safety record and argued that the Respondent's apprentice ironworkers were at serious risk. According to Paquette, the Respondent's "putting ironworkers up on steel is like throwing babies into the Merrimack River . . . ." The majority finds that this statement was outside the protection of the Act, permitting the Respondent to refuse to consider Paquette for employment, on the basis of the statement. To my mind, however, Paquette was guilty of nothing more than hyperbole.

Paquette was a paid advocate, seeking to persuade a state agency, and his statement should be assessed in that context. It may be true, as the majority points out, that "Paquette's disparaging remarks occurred in the absence of any labor management dispute": Paquette's union did not represent the Respondent's employees and was not seeking to organize them. Whatever the significance of that fact, it is also true that Paquette was not an employee of the Respondent when he made his statement: he owed the Respondent no duty of loyalty then. The issue, of course, is not whether the Respondent was privileged to discipline or discharge a current employee, but whether it was free to refuse to consider Paquette for employment, after he left his union position. In this context, we should ask whether Paquette's language was so extreme that it made him categorically unfit for *future* service with the Respondent.[2]

This is a high standard—but appropriately so—and it has not been satisfied under the circumstances here. Thus, I would reverse the judge and find a violation of Section 8(a)(1). "[F]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Old Dominion Branch*, supra, 418 U.S. at 283. The result of the majority's decision, I fear, will be to chill union advocates. They must now watch their words carefully when they criticize an employer from whom they may one day seek

[1] See, e.g., *Letter Carriers (Old Dominion Branch No. 496) v. Austin*, 418 U.S. 264 (1974); *Linn v. Guards Union Local 114*, 383 U.S. 53 (1966); *Phoenix Transit System*, 337 NLRB 510, 414 (2002);. *Postal Service*, 241 NLRB 389 (1979).

[2] Cf. *Dreis & Krump Mfg., Inc.*, 221 NLRB 309, 315 (1975), efd. 544 F.2d 320 (7th Cir. 1976) (reviewing discharge of employee and observing that "offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protections unless they are so flagrant, violent, or extreme as to render the individual unfit for further service"). See also *Honda of America Mfg., Inc.*, 334 NLRB 746, 749 (2001) (Member Walsh, dissenting).

a job. Because the Act envisions "uninhibited, robust, and wide-open debate," id. at 273, not polite circumspection, I dissent.

Cristina M. Poulter, Esq., for the General Counsel.
Macon P. McGee, Esq., of Boston, Massachusetts, for the Respondent.
Mickey Long, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Boston, Massachusetts, on December 1, 1999. Subsequent to an extension in the filing date briefs were filed by the General Counsel and the Respondent. The proceeding is based upon a charge filed February 22, 1999, by David Paquette, an individual. The Regional Director's complaint dated July 28, 1999, as amended, alleges that Respondent, American Steel Erectors, Inc., of Greenfield, New Hampshire, violated Section 8(a)(1) of the National Labor Relations Act (the Act) by refusing to consider Paquette for hire on September 17, 1998, because of his affiliation with, and concerted activities on behalf of the International Association of Bridge Structural, Ornamental and Reinforcing Iron Workers, Local 474 and by telling him that he was not being considered for hire because of his union activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is contractor in the construction industry engaged in the fabrication and erection of structural steel. It annually performs services valued in excess of $50,000, and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside New Hampshire. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2)(6) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent serves clients in the various New England States and in the course of its business hires employees in the ironworkers trade. Raymond Chilly is its president. He runs the Respondent's day-to-day operations and either he or one of his sons makes all hiring and firing decisions. On July 30, 1998, the Respondent made a job openings listing for "iron workers" with the New Hampshire Department of Unemployment and Training. The department posting, dated September 1, 1998, sought:

> F/T PERM. IRON WORK EXPERIENCE HELPFUL, BUT WILL TRAIN IN 3-YR APPROVED APPRENTICESHIP PGM. MUST HAVE NO FEAR OF HEIGHTS, WILL BE WORKING W/STRUCTURAL STEEL SITES IN NH, MA, ME, AND VT. BENEFITS, $10+HR. CALL AMERICAN STEEL ERECTORS 603-547-6311 FOR APPT/DIRECTIONS.

For several years prior to 1998 David Paquette was employed by the Union as an appropriate coordinator and instructor. In September 1998, Paquette learned he was about to lose his position with the Union. He was aware of the Respondent's job order report on file with the State and he called and spoke to Catherine Sanderson, the Respondent's human resource and payroll administrator. In sequence, Paquette testified that he asked Sanderson about the benefits listed, she responded and asked if he was a qualified ironworker. Paquette informed Sanderson that he had been doing steel erection for 20 years and then recalled that at the beginning of the conversation he has asked if the position had been filled and she said it had not. Sanderson stated the location of various projects and Paquette expressed an interest in southern New Hampshire. Paquette also asked Sanderson if Respondent would hire a union ironworker, if that would make a difference? Sanderson replied, "[N]o," that it depended on experience. Paquette asked when he could come down for an interview. Sanderson said she would get back to him. Paquette then told Sanderson that working for Respondent would be an opportunity to organize the employees and Sanderson replied, "[R]eally."

On September 14, Paquette telephoned Sanderson again. Sanderson put him on hold and a few minutes later told Paquette he would have to be interviewed by the owner who was not there and told Paquette to call her again on Thursday morning. Paquette phoned on Thursday. Sanderson was busy but called Paquette back later that day. Sanderson asked him if he was the same David Paquette "that was at the State Apprenticeship Council." He told that her that he was the same person. Sanderson then told him that his application was denied base on his actions at the Apprenticeship Council, and hung up the telephone.

In 1997, the Respondent applied to the New Hampshire Apprenticeship Council to obtain certification for its apprenticeship program. Its program initially was presented to the Apprenticeship Council at its February 20, 1997 meeting. Although Paquette did not speak, [he] was present at meeting, because he wanted to check out the Company's program to see if it was valid and whether individuals entering the ironworker industry would be safe in learning a new career and receive comprehensive training.

He thereafter attended council meetings on May 1, June 12, and August 25. He spoke in opposition to the Respondent request at each meeting, reportedly challenging Respondent's safety record, its workers' compensation coverage, and its ability to offer comprehensive training. There is no indication that he identified himself at these meetings as a representative of the Union other than the notation in the Council minutes that referred to "Paquette of the Iron Workers." The June 12 minutes refer to a list of OSHA violation against American Steel Erectors as being pertinent to five or six other companies with that name and that no significant violations were against the Re-

spondent, (an allegation made by Paquette), at the May 1 meeting.

Paquette repeated his disproved allegations at subsequent meetings (after dramatically making a printout fall to the floor), and at one of the meetings, in owner Cilley's presence (Sanderson apparently attended all these meetings but she did not testify about what she observed), Paquette made a statement to the Council to the effect that: "putting ironworkers up on the steel is like throwing babies into the Merrimack River if they worked for American Steel."

At the August meeting the Counsel voted to approve the Respondent request.

Owner Cilley stated he made a decision to not consider Paquette for a position. When asked why he made that decision, he answered:

> Because I didn't personally like him based on conduct at a meeting, which was held in Concord. I just didn't like his attitude, his demeanor. I did not feel that based on the size of our company that he would fit in very well with the rest of our workers. I didn't think that he was sincere in his requesting a job.

It also was shown that no experienced ironworkers were hired by the Respondent subsequent to its job posting, however it was shown that a Harold Crothers Jr. applied for a position on August 7, 1998. He was offered a class II Ironworker, position when he was interviewed on August 21 and he started work on September 8. The Respondent also hired two apprentices, Douglas Snowden and Steven Olivo on October 12, 1998, and March 25, 1999, respectively.

Discussion

Here, the General Counsel contends that the Respondent refusal to consider applicant Paquette for an ironworker position was motivated by antiunion considerations drawn from Paquette's appearances before the New Hampshire Apprenticeship Council.

A. Refusal to Hire Criteria

The Board enforces a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), otherwise, the foundation of 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187 (1941).

Based on the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *KRI Constructors*, 290 NLRB 802, 811 (1988), and case cited therein, the General Counsel is required to meet an initial burden of proof and establish that (1) an individual attempts to file an employment application; (2) the employer refused to consider the applicant; (3) the applicant is or might be expected to be a union supporter; (4) the employer has knowledge of the applicant's union sympathies; (5) the employer maintains animus against union activity; and (6) the employer refuses to consider the applicant for hire because of such animus. If the General Counsel does so, the employer must establish that for legitimate reasons the applicant would not have been hired absent the discriminatory motive.

Here, there are no issues related to Paquette's qualification and there are no viable issues relative to the existence of a job opening and, otherwise, the facts essentially are undisputed as to items (1) through (4).

B. Animus and Motivation

The record here shows neither a history of antiunion animus nor any attendant violations of the Act by the Respondent (such as an inquiry by the Respondent regarding the applicant's union status). Paquette testified that when he asked if being a union worker would make a difference, Sanderson answered, "[N]o it depended on experience." This line of inquiry was not developed further when Sanderson was on the stand as the General Counsel's witness. Accordingly, I credit Paquette's testimony of what Sanderson said and I find no basis for disregarding her plain statement and I find no basis for inferring that her statement is not credible.

While Paquette's union affiliation were volunteered in his phone conversation with the Respondent, the General Counsel also shows that Paquette engaged in other activity that apparently identified him to the Respondent. In this connection, the record shows Paquette took upon himself, as apprentice coordinator,[1] a practice of attending apprenticeship Council meetings. The record does not show that he identified himself as a representative of the Union in any of the meetings concerning the Respondent, however the Council itself apparently knew that Paquette was "of the ironworkers."

The record does not clearly show that Paquette's council appearances (and his persistent opposition to the Respondent's application) were endorsed by the Union or were made on behalf of the Union, or others (he made no written reports to the Union but asserts that he told union business agents of his activities). However, I find that there is at least some ambiguous indication that his statements have the appearance of being on behalf of the Union and relate to the interest of other employee and apprentices in general.

On this record there is a striking absence of any display of hostility by the Respondent toward the Union, no history of rejections of union members and no record of unfair labor practices that might somehow support an inference of animus. Here, the only animus shown is the displeasure expressed by the Respondent's owner with Paquette's personal demeanor and, specifically, the defamatory allegations he made against the Company.

Under appropriate circumstances, an individual's appearance on behalf of a union or other persons before a public body could be considered an activity that normally would enjoy the

[1] There is no probative showing that the Union directed him to do so or that the Union instructed him to make the statements he made at these meetings. Otherwise, it is noted that the Union is not a party herein, and no representative of the Union appeared as a witness. There is no indication that the Union endorsed his actions other than his self-serving statement that as coordinator he would go to Apprenticeship Bureau meetings and monitor the industry (he has no written job description for his position). Coincidentally, it appears the Union removed him from this position within the next year.

full protection of the Act. Some appearances, however, might not be considered to be concerted activity, see *Pikes Peak Pain Program*, 326 NLRB 136 (1998), and some activity can be considered to be so egregious as to take it outside the protection of the Act. Here, I find that the Respondent's owner reasonably believed that Paquette used outrageous and defamatory exaggerations by stating that working on steel for the Respondent was the equivalent [of] throwing babies into a river (as well as flamboyant misrepresentations about its OSHA records and insurance compliance). Thus, Paquette went well beyond challenging the safety aspects of the Respondent's business and equated its construction practices with the deliberate murder of helpless infants. In owner Cilley's belief, the manner in which Paquette presented his opinions to the Council displayed "conduct," "attitude," and "demeanor" affected his potential employability and here, I find that it would not be unreasonable to find that Paquette's reckless abuse of his free speech rights separated his personal behavior from the res gestae of his alleged protected activity.

At best, the General Counsel has made a week case of showing that the Respondent's refusal to consider Paquette for hire might have been based on his participation in protected union activity and, under the circumstances I find it appropriate also to consider the Respondent's defenses under the *Wright Line* criteria.

C. Refusal to Consider

Here, I find that the preponderance of the evidence successfully rebuts the General Counsel's case and I conclude that the Respondent clearly has shown that had legitimate business reasons and concerns, unconnected with the applicant's alleged union activity, that motivated its decision not to consider him for hire. Based on what reasonably was considered to be egregious behavior by Paquette, owner Cilley concluded that based on the size of the Company, someone with Paquette's demeanor would not fit very well with other workers and that it was important to have ironworkers that work well with each other. He also felt that Paquette wasn't sincere in his request for a job. Accordingly, I find that the record fails to show that Paquette was not considered for hire for any other reason than his offensive, intemperate language and provocative conduct in front of the person in Respondent's company who had the primary hiring authority.

Here, the Respondent had no history of antiunion animus or history of any unfair labor practices and there is nothing to indicate that the Respondent would attempt to retaliate against Paquette merely because of his appearance before the State Council in opposition to the Respondent's apprenticeship application.

Owner Cilley's demeanor was forthright and persuasive and, on this record, I conclude that Cilley's decision was controlled solely by his negative impression of Paquette based not on union animus but on Paquette's outrageous exaggerations. I also find that he had legitimate doubts about the trustworthiness and successful employability of someone who was seeking employment in the very position he has disparaged by stating that working for the company was so risky that putting ironworkers on structures being fabricated was like throwing babies into a large river. Accordingly, I find that the Respondent has successfully shown that it relied upon legitimate independent, nondiscriminatory reason for its refusal to consider the Charging Party's application for employment.

Under these circumstances, its is clear that the applicants' union or protected activity was not the basis for the Respondent's decision and that it had a legitimate reasons for its actions which would have resulted in the same decision even in the absence of any protected union activity. See *Heilger Electric Corp.*, 325 NLRB 966 (1998). I, therefore, find that the General Counsel has not carried its ultimate burden and it has not shown that any violation of the Act occurred, as alleged. Accordingly, it must be recommended that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent American Steel Erectors, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

ORDER[2]

The complaint is dismissed in its entirety.

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."